

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

E. I. DUPONT DE NEMOURS AND COMPANY	)	
AND	)	Case No. 5-CA-33461
AMPTHILL RAYON WORKERS, INC., INTERNATIONAL BROTHERHOOD OF DU PONT WORKERS	)	ALJ Michael A. Rosas

**ANSWERING BRIEF OF  
RESPONDENT E. I. DUPONT DE NEMOURS AND COMPANY**

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## **INTRODUCTION**

Counsel for the Acting General Counsel's ("General Counsel's") Brief in Support of his Limited Cross-Exceptions ("GC Brief") highlights the glaring flaw in the Administrative Law Judge's ("ALJ") conclusion in this case. The ALJ made the following key findings of fact, all of which demonstrate that the Union waived its right to bargain over changes to MEDCAP and the Dental Plan:

- The Company and the Union bargained over participation in the Dental Assistance Plan ("DAP" or "the Dental Plan") in 1976 and the Union "agreed to participation in DAP . . . subject to the Company's reservation of rights." ALJD at 4.
- The reservation of rights provision of the Dental Plan reserves to the Company "the sole right to amend or discontinue this Plan at its discretion" and the reservation of rights provision "has remained unchanged since 1976." ALJD at 4-5.
- The Company and the Union bargained over Union members' participation in MEDCAP from October 1985 until September 1986, with much of the discussion focusing on the reservation of rights provision of MEDCAP. ALJD at 5-6.
- In September 1986, the Union "agreed to participation in the new Aetna Plan (MEDCAP), including the reservation of rights clause." ALJD at 6.
- The reservation of rights clause of the MEDCAP plan reserved to the Company the right to suspend, modify, or terminate the MEDCAP plan, and the reservation of rights language "has not changed since the plan document was adopted." ALJD at 3, 6 n. 37.
- "On more than 50 occasions, the Company has announced changes to" MEDCAP and the Dental Plan and has unilaterally "implemented MEDCAP and DAP changes every year since 1987." ALJD at 9.

Notwithstanding these findings of fact, the ALJ concluded – erroneously – that DuPont failed to demonstrate a clear and unmistakable waiver of the Union's right to bargain over changes to MEDCAP and the Dental Plan.

The General Counsel, recognizing that the ALJ's findings of fact should lead the Board to conclude – contrary to the ALJ – that the Union waived its right to bargain over changes to MEDCAP and the Dental Plan, now excepts to the ALJ's key finding: that the medical plan over which the parties bargained in 1985 and 1986 was MEDCAP. The General Counsel asserts, over seven pages of argument, that the 1985-86 bargaining was about some other corporate-wide healthcare plan, not MEDCAP, that contained a reservation of rights clause. The General Counsel's attack on the ALJ's key finding is unavailing.

**A. MEDCAP Is the Aetna Insurance Plan Over Which the Parties Bargained**

To support his cross-exception to the ALJ's finding that "the Union and Respondent bargained over MEDCAP in 1985 and 1986," the General Counsel contends "the parties were not bargaining over MEDCAP in 1986."<sup>1</sup> GC Brief at 8; *see also* GC Brief at 2 ("the judge found that the parties bargained the subject of MEDCAP and reservation of rights language in 1986. However, the record evidence indicates that the parties were not bargaining about MEDCAP"). In fact, the ALJ's finding is proper and supported by undisputed record evidence.

The General Counsel concedes, as he must, that the Union agreed to participate in a medical plan containing a reservation of rights provision, and that plan was known as the "Aetna Plan." GC Brief at 4-5. But he then argues that the "Aetna Plan" is not MEDCAP. GC Brief at 5.

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<sup>1</sup> The General Counsel does not attempt to create a similar fallacy with respect to the Dental Assistance Plan. The record is clear that the Union consciously explored the reservation of rights language of the Dental Assistance Plan, agreed to participate in that Plan subject to the reservation of rights provision, and agreed to include that Plan in the CBA until the Union accepted BeneFlex.

Contemporaneous communications to employees, minutes of Company-Union meetings, and undisputed testimony at the hearing leave no doubt that MEDCAP is “the Aetna Plan,” and that the terms “MEDCAP” and “the Aetna Plan” were used interchangeably at Spruance. First, the contemporaneous Employee Information Bulletins (EIBs) – sent to all employees, including Union officers – explicitly state that MEDCAP and the Aetna Plan are one and the same:

- “Health Wise is Du Pont’s newest addition to the Medical Care Assistance Program (MEDCAP) which is the Aetna insurance plan.” (Resp. Exh. 4, tab 1, 9/17/90 EIB) (emphasis added);
- “Education of the AETNA (MEDCAP) Health Insurance Plan” (*Id.*, tab 2, 10/8/90 EIB) (emphasis added);
- Each employee can choose between Aetna/MEDCAP and BC/BS during September and October for 1992 coverage.” (*Id.*, tab 3, 9/5/91 EIB); (emphasis added);
- “Each employee can choose between Aetna/MEDCAP and BC/BS,” providing deductibles for each, including “Aetna/ MEDCAP - Option B in BeneFlex.” (*Id.*, tab 4, 8/31/92 EIB) (emphasis added).

*See also id.*, tab 5, 9/25/92 EIB (referring to MEDCAP as “Aetna/MEDCAP”) and tab 7, 1/8/93 EIB (same).

Second, the Company’s meeting minutes also demonstrate that the Union and the Company alike referred to MEDCAP and the Aetna Plan interchangeably:

- “Management said those employees that elected [severance benefits] would be covered under Medcap/Aetna Plan for health care but could not elect Blue Cross Blue Shield” (Resp. Exh. 3, tab 44, p. 2, Contract Committee minutes, 11/18/92).
- “Management said Blue Cross and Blue Shield medical coverage is a site local plan . . . Management said employees currently covered under Blue Cross Blue Shield could switch to the Aetna/Medcap medical plan which is a corporate plan. The union said it understood.” (*Id.*, tab 46, p. 4, Contract Committee minutes, 12/7/92).
- “The Union asked when there will be more understanding around the Blue Cross/Blue Shield program as it relates to Woolards’ communication. Management said it will be working on this in 1993 to make BC/BS and Aetna/Medcap comparable.” (*Id.*, tab 47, p. 1, Contract Committee minutes, 1/5/93).

Third, the witnesses who testified on this subject at the hearing all confirmed that “MEDCAP” and “the Aetna Plan” were synonymous. Company benefits counsel Mary Jo Anderson explained in her testimony why the MEDCAP plan was known as the “Aetna plan” at Spruance. She testified that MEDCAP was developed in the mid-1980s, as a self-insured corporate-wide medical plan. (Anderson, 148). DuPont retained Aetna, along with one other carrier, to provide “administrative-only services” under MEDCAP. (*Id.*, 149). Accordingly, the employees at Spruance would regularly refer to MEDCAP by the name of the carrier, Aetna. Linda Derr, the former Human Resource Manager at Spruance, testified:

Q. Okay. During your period at Spruance, how or through what plans did pensioners or their survivors receive medical or dental benefits?

A. We called it the Aetna plan, but I know that it's really the MEDCAP plan is what folks received.

(Derr, 237). Similarly, the Union’s only witness, Mr. Donny Irvin, did not dispute during his testimony that MEDCAP and Aetna refer to the same plan when the Company’s lawyer asked him a question about “Aetna under MEDCAP.” (Irvin, 68). Indeed, at no time did Mr. Irvin – or Counsel for the General Counsel or the Union’s Counsel – ever contend at hearing that the Aetna Plan and MEDCAP were different.

The General Counsel’s 11<sup>th</sup>-hour theory – not even articulated at the hearing – that Aetna was a separate plan is not only unsupported by the record; it is also illogical. Under the General Counsel’s theory, an entirely new company-wide medical plan, separate from MEDCAP, magically appeared, and then disappeared, from Spruance during the exact same time in which DuPont introduced MEDCAP at Spruance and elsewhere throughout the company. There is no record of this mythical plan: the Union put forward no evidence of its existence, there was no testimony about another MEDCAP-like plan being accepted and then later discontinued at Spruance, and – while the Union surely does not contest that MEDCAP existed and continues to

exist at Spruance – there was no testimony that MEDCAP was later introduced, and accepted, at Spruance.<sup>2</sup> This is because no such company-wide “other plan” ever existed.

Simply put, there is no question that MEDCAP and the Aetna Plan were one and the same. The General Counsel is correct that the parties, as reflected in the meeting minutes, at times referred to MEDCAP as Aetna. At other times, as described above, the parties referred to the plan as MEDCAP/Aetna. And at other times they referred to it simply as MEDCAP.

Regardless of which descriptor was used, there is no question that “**Medical Care Assistance Program (MEDCAP) . . . is the Aetna insurance plan.**” (Resp. Exh. 4, tab 1, 9/17/90 EIB) (emphasis added). Thus, the myriad discussions of the reservation of rights language in 1985 and 1986 – cited exhaustively by the General Counsel in his Brief and cited by the ALJ in his decision – were discussions of the reservation of rights language of MEDCAP, to which the Union agreed.

**B. The General Counsel Fails to Address Clear Evidence that the Parties “Fully Discussed” and “Consciously Explored” MEDCAP’s Reservation of Rights Language**

Further distorting the record and attempting to create an ambiguity where none exists, the General Counsel selectively cites pieces of the bargaining history over MEDCAP, ignoring the crucial provisions of the notes and other undisputed record evidence that support a determination that the parties “fully discussed” and “consciously explored” MEDCAP’s reservation of rights provision before the Union agreed to it. A close reading of the entire record belies the General Counsel’s claim that the Union never accepted MEDCAP with the reservation of rights

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<sup>2</sup> Prior to the General Counsel’s briefing here, the Union never argued that any medical plan was at issue other than MEDCAP and, in fact, conceded that MEDCAP was the plan the Company “initially adopted” in 1983. (*E.g.*, GC Exh. 1(a) at ¶¶ 6, 8(b); Jt. Exh. 1 at ¶ 6 (stating, in part, that MEDCAP was adopted in 1983)).

provision, and the ALJ's conclusion that DuPont failed to demonstrate a clear and unmistakable waiver.

The parties first discussed MEDCAP in 1982, when the Company told the Union that MEDCAP was a new medical plan that "was being made available for consideration by Management at each site." (Resp. Exh. 3, tab 8, p. 1, Contract Committee minutes, 12/3/82). The Union was also told "MEDCAP would be in lieu of the traditional [local medical plan, Blue Cross Blue Shield ("BCBS")]" coverage, and that "Aetna would be the carrier for this program." (*Id.* at p. 2.) (emphasis added). That reality never changed.

The parties discussed MEDCAP a number of times in 1985. At that time, Spruance employees received medical coverage under the BCBS plan pursuant to the Health, Medical and Surgical ("HMS") provision, Article VIII, of the parties' CBA. (*See* Resp. Exh. 5a, p. 14). Neither the HMS provision nor the BCBS plan contained a reservation of rights clause, and changes to the BCBS plan therefore required bargaining to agreement or impasse prior to implementation. (*See* Resp. Exhs. 5a, pp. 14-15 and 5b, pp. 34-35; Resp. Exh. 3, tab 13, p. 3, Contract Committee minutes, 9/3/85). The Company told the Union it was seeking the ability to adopt a medical plan, after bargaining with the Union over the acceptance of the plan, that would permit DuPont to "make necessary changes to meet the business need," without first bargaining (*Id.* at p. 2). That plan was MEDCAP.

In December 1985, in the context of making an HMS contract proposal, the Company informed the Union that Aetna might act as carrier for MEDCAP:

The new proposal would include a "Management's Rights" Clause. If Aetna is the carrier, this is a corporate plan which includes a standard "right to change."

(Resp. Exh. 3, tab 17, p. 3, Contract Committee minutes, 11/26/85) (emphasis added). During the December 1985 meeting, the Company reiterated that it had not yet made a proposal on MEDCAP, but “Management said they intended to make a proposal on MEDCAP to the Union.” (*Id.* p. 6) (emphasis added).

As promised, the Company made an HMS proposal regarding MEDCAP in late February 1986. That proposal provided employees with two medical plan options. Employees could select Option I, which was the local BCBS plan, providing a continuation of the existing coverage. Alternatively, they could select Option II, which was the corporate-wide MEDCAP plan administered by Aetna, with the reservation of rights provision. (*Id.*, tab 18, p. 2, Contract Committee minutes, 2/26/86). The Union specifically asked “if the cost for the Aetna plan is for the length of the Agreement, [and] Management said there is no cost to employees[,] but deductibles, co-pay, stop loss are subject to change under the Management Rights Clause.” (*Id.*, pp. 5-6).

The parties discussed MEDCAP again a few weeks later in March 1986. At that point, the Company provided the Union a Summary Plan Description, and the parties specifically discussed the Union’s concern over the reservation of rights provision or “Management Rights Clause” in the plan. The Company explained in crystal clear terms that the Aetna/MEDCAP plan was a corporate-wide plan, that all corporate-wide DuPont plans contained a reservation of rights clause, and that MEDCAP would not be offered to Spruance employees without the clause:

Management said the Management’s Rights Clause is standard language in all corporate plans. Other corporate plans such as [the] pension plan have the same type language. Management said they will not present a corporate plan that does not have a Management’s Rights Clause.

(Resp. Exh. 3, tab. 19, p. 3, Contract Committee minutes, 3/4/86) (emphasis added). The Company also made clear that MEDCAP was being offered to the Union simply as an alternative to the existing local BCBS plan, which did not contain such a provision.

Management said in 1985 they again looked at MEDCAP. They went to Blue Cross-Blue Shield to see if it could provide Option I or Option II and BC-BS said they could. Management looked at Blue Cross' capability and decided they could not provide the type service [sic] Management wanted for employees. Management then asked Blue Cross Blue Shield how savings comparable to MEDCAP could be achieved. Blue Cross-Blue Shield said "Pre-Admission Review should save about 5%. After much consideration, Management decided to offer both.

(*Id.*, tab 20, p. 11, Contract Committee minutes, 3/20/86) (emphasis added).

The General Counsel's interpretation of this passage demonstrates the lengths to which he will go to attempt to create ambiguity where none exists. The General Counsel claims that the reference to "both" in the last sentence of the block quote above ("... Management decided to offer both") is ambiguous. GC Brief at 7. In fact, he argues that "both" is not a reference to BCBS and MEDCAP and asserts that "the more likely reading of this passage" is that the Company decided to offer both "an Option I and II and the cost containment of pre-admission review" through BCBS. *Id.* This argument is unavailing. The passage clearly and unambiguously states that the Company "decided they [BCBS] could not provide" the Option I and Option II service the Company wanted and, instead, decided to offer both BCBS and MEDCAP (Aetna) to Union-represented employees at Spruance. Which, of course, is exactly what happened.

The General Counsel also conveniently omits the key passage during the same bargaining session, in which management explained why the Company was insistent that MEDCAP include a reservation of rights provision:

Management said they do not agree with the Union's rejection [of the reservation of rights provision set forth in Aetna (MEDCAP) Plan]. They believe it is necessary to have this language in the Aetna Plan.

Management said it is necessary to be able to maintain that plan on an ongoing basis; therefore, they need the clause. The Union asked, "why not have it in the Blue Cross-Blue Shield Plan, but in the Aetna Plan?"

Management said the Blue-Cross Blue Shield Plan is a local plan that management controls; the Aetna plan is a corporate plan.

(Resp. Exh. 3, tab 20, pp. 10-11, Contract Committee minutes, 3/20/86) (emphasis added). The Company specifically noted that that "[e]mployees do not have to choose the Aetna Plan which contains the Management's Rights Clause if they are concerned" about the Company's right to make changes to the plan. (*Id.*, tab 19, p. 3) (emphasis added).

On that basis, the Union agreed that MEDCAP could be made available to its members, and the parties turned their attention to how and whether the Union's agreement to participate in MEDCAP would be referenced in the CBA. (Resp. Exh. 3, tab 23, p. 2, Contract Committee minutes, 9/5/86). The Union suggested that MEDCAP not be referred to in the CBA, or alternatively that it be included in the CBA's IRP&P provision with the other corporate-wide plans. At that time, the Union specifically recognized that it was agreeing to MEDCAP with full knowledge that it contained a reservation of rights provision:

Management said if it is offering an option to Blue Cross-Blue Shield, then it needs to some way to refer to that option. . . . The Union asked if the alternate insurance plan could be mentioned under the Industrial Relations Plans and Policies with a footnote like the Dental Plan. The logic for that being it contains a Management's Rights Clause in it, and could be listed along with the other plans over which the Company has control.

(*Id.*) (emphasis added). As the General Counsel correctly notes, DuPont retains the right to make changes to the plans listed in the IRP&P provision unilaterally. GC Brief at 7; Resp. Exh. 12, p. 48 ("Article VII, Section 1, of the Agreement recognized the Company's right to

unilaterally amend the IRP&P Plans generally and to extend those mid-term unilaterally adopted modifications to the Spruance bargaining units.”).

The Company was unwilling to include MEDCAP in the IRP&P section of the contract because the one-year notice requirement (before changes could be implemented unilaterally) would not permit the Company to exercise its full rights under the reservation of rights language. Therefore, the parties agreed to modify the HMS provision to refer to the existence of the alternative plan in general terms. To that end, the parties added to the HMS provision the following: “The Company may make available to employees alternate hospital and medical-surgical coverage plans.” (Resp. Exh. 6(b) at 36). That provision remained in the CBA until the Union accepted BeneFlex in 1993, at which point the HMS provision was removed from the CBA. Throughout this time period – as reflected in the EIBs and meeting notes cited above – Spruance employees continued to have the option of participating in MEDCAP (subject to the Company having the ability to make unilateral changes) or in the local BCBS plan. The removal of the HMS provision from the contract in no way altered the parties’ agreement regarding MEDCAP, however. Union members continued to participate in MEDCAP and the Company continued to implement unilaterally changes to MEDCAP, without protest from the Union, until the 2006 change at issue here.

In short, the record evidence shows, unequivocally, that the Union discussed, and fully explored, the meaning and potential effect of the reservation of rights provision contained in MEDCAP. It then consciously agreed to have its members participate in MEDCAP, subject to the reservation of rights language.

## **CONCLUSION**

For all of the foregoing reasons, Judge Rosas' Decision should be reversed, and the Complaint should be dismissed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this the 14th day of November 2011, I caused a true and accurate copy of the forgoing to be served by electronic mail on the following parties:

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